



January 02, 2024

VIA ELECTRONIC SUBMISSION

Assistant Secretary of Labor, Lisa Gomez  
Employee Benefits Security Administration  
Department of Labor (DoL)  
200 Constitution Ave NW  
Washington, DC 20210  
Agency/Docket Number: 2023-23779

**Re: 88 FR 75890, “Retirement Security Rule: Definition of an Investment Advice Fiduciary”**

Dear Assistant Secretary Gomez:

The National Council on Aging (NCOA) is pleased to provide the Department of Labor’s (DoL) Employee Benefits Security Administration (EBSA) comments on the notice of proposed rulemaking regarding financial advice and junk fees. The following includes NCOA background and detailed comments on EBSA’s proposals.

### **NCOA Background**

NCOA is a respected national leader and trusted partner helping people aged 60+ meet the challenges of aging. Our mission is to improve the lives of millions of older adults, especially those who are struggling. NCOA’s advocacy is informed by its national collaboration with community-based organizations, senior centers, Medicare State Health Insurance Assistance Program (SHIP) counselors, Benefit Enrollment Center (BEC) staff, as well as by its advocacy partners.

### **Overview of NCOA Recommendations**

In our letter, NCOA supports the various proposals such as those around barring “junk fees” and encouraging the provision of financial advice that’s in the best interests of the consumer.

Thank you for the opportunity to submit comments. We welcome further discussion. For additional information or questions, please contact Matthew Hubbard at [Matthew.Hubbard@NCOA.org](mailto:Matthew.Hubbard@NCOA.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Ramsey Alwin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ramsey Alwin, President and CEO  
National Council on Aging

**C. Purpose of the Proposed Rule and Summary of the Major Provisions**

**2. Summary**

**EBSA proposes** defining an investment advice fiduciary to shape advisor behavior. The agency says that each of the definition's components would have to be satisfied for the regulatory definition to apply.<sup>1</sup> Also, the definition's proposed financial advice standards would apply to individual transactions.<sup>2</sup> **EBSA also proposes** the following definitions and standards around investment advice:

- The investment advice is either given directly or indirectly;
- The advisor makes recommendations on a regular basis "as part of their business";
- The recommendation given to the retirement investor is tailored to the investor's needs or circumstances;
- The advice can be relied upon to make investment decisions;
- The advice is given with the investor's best interest in mind; and
- The advisor acts as a fiduciary when making this advice.<sup>3</sup>

**NCOA supports** the proposals to apply standards around retirement recommendations, especially the proposal to have the advisor act with the best interest of the investor in mind. If an individual purchases an annuity product that is not a right fit for them, they will suffer long-term financial consequences including paying higher fees long-term and will have a harder time making ends meet.

We appreciate the agency's commitment to applying the proposed standards in a broad enough way to include financial advisors of various types including non-fiduciary financial advisors. According to *Business Insider*, non-fiduciary financial advisors may be more affordable, but may be less likely to offer unbiased advice to investors.<sup>4</sup>

We agree with EBSA that laws and regulations around investment advice for retirement savings made in the Employee Retirement Income Security Act of 1974 should be updated to reflect the industry's shift towards Individual Retirement Accounts (IRAs) and 401(k) accounts. We applaud EBSA for taking steps to ensure that investors in IRAs and 401(k) can safely assume that an "investment advice fiduciary" provides recommendations that promote their customers' financial interests. IRA and 401(k) investors should not be more vulnerable to harm than investors in other types of retirement savings vehicles.

Internal Revenue Service (IRS) data highlight the importance, for instance, of IRA accounts for adults approaching retirement as well as for older adults. In 2020, over 728,000 55- to 59-year-olds and over 508,000 65- to 69-year-olds had traditional IRA plans.<sup>5</sup> According to an IRS analysis of IRA plans using 2007 and 2018 tax year data, individuals contributed the largest

---

<sup>1</sup> Page 75901.

<sup>2</sup> Page 75901.

<sup>3</sup> Page 75900.

<sup>4</sup> Tessa Campbell. "Biden wants to crack down on 'junk fees' in retirement plans. Here are 4 ways to cut out junk fees until then." *Business Insider*. 02 November 2023. 10 December 2023. <https://www.msn.com/en-us/money/savingandinvesting/biden-wants-to-crack-down-on-junk-fees-in-retirement-plans-here-are-4-ways-to-cut-out-junk-fees-until-then/ar-AA1ji6JQ>.

<sup>5</sup> IRS. "Taxpayers with Individual Retirement Arrangement (IRA) Plans, by Type of Plan and by Age of Taxpayer, Tax Year 2020." 27 April 2023. 10 December 2023. <https://www.irs.gov/statistics/soi-tax-stats-accumulation-and-distribution-of-individual-retirement-arrangements>.

total contributions in tax year 2018 with over \$70 billion contributed.<sup>6</sup> NCOA serves hundreds of thousands of individuals who have invested their hard-earned money into retirement savings accounts. We believe it's appropriate for the Department of Labor to take steps to ensure that financial advisors are providing investors with advice that is in their interest.

In an ideal investment environment, the investor can have access to accurate information to make informed decisions. Yet some advisors do not always act in a transparent manner. It will be critical for EBSA to enforce these proposals to ensure that this is the case.

In January and February 2023, NCOA surveyed women ages 25 and older to understand their financial concerns and what they think policymakers should do to improve their financial security. For the Gen X cohort of individuals polled – a group born between 1965 and 1980, the top concern for these women was not having enough money saved to be able to retire.<sup>7</sup> A separate NCOA research project has also shown that 80 percent of older adults aged 60 and older don't have enough saved finances to withstand a financial shock.<sup>8</sup> In a study looking at upper and lower "middle class" older adults using 1994-2018 data, authors of an August 2023 *Health Affairs* article show that lower-middle-income people approaching retirement are on increasingly shaky financial ground.<sup>9</sup> According to the study, earnings for people in the lower-middle income bracket dropped by 5 percent during this period.<sup>10</sup> In its 2022 report on the financial well-being of adults, the Consumer Financial Protection Bureau found that in 2022 40 percent and 20.3 percent of individuals surveyed with ages spanning from, respectively, 40 to 61 as well as those age 61 and older said they had difficulty paying bills.<sup>11</sup> Given these various findings showing the challenges of meeting expenses and saving for retirement, we appreciate EBSA's effort to ensure that retirement savings advice is in the investor's best interest.

### 3. Covered Advice and Recommendations

**EBSA proposes** to cover "securities or other investment property of the retirement investor."<sup>12</sup> In this section, **EBSA also proposes** to add language focusing on the need for transparent communications around the nature of the investment services.<sup>13</sup> The agency hopes the proposals will make it more difficult for fine-print disclaimers that attempt to work around statutory and regulatory requirements.<sup>14</sup>

**NCOA supports the proposal** given that we feel more transparency and less fine print would greatly benefit the investor. The annuity purchasing process can also be cumbersome, so investors may turn to advisors to help them. It's therefore essential that advisors communicate

---

<sup>6</sup> IRS. "Individual Retirement Arrangements, Tax Year 2018." Publication 5498 (3-2021). 10 December 2023. <https://www.irs.gov/pub/irs-pdf/p5498.pdf>.

<sup>7</sup> NCOA. "What Women Say: Women and their Financial Security." May 2023. 10 December 2023. <https://www.ncoa.org/page/what-women-say-about-their-finances>.

<sup>8</sup> NCOA. "80% of Older Americans Cannot Pay for Long-Term Care or Withstand a Financial Shock, New Study Shows." 19 April 2023. 10 December 2023. <https://www.ncoa.org/article/80-percent-of-older-americans-cannot-pay-for-long-term-care-or-withstand-a-financial-shock-new-study-shows>.

<sup>9</sup> Jack M. Chapel, Bryan Tysinger, Dana P. Goldman, John W. Rowe, and The Research Network on an Aging Society. "The Forgotten Middle: Worsening Health And Economic Trends Extend To Americans With Modest Resources Nearing Retirement." *Health Affairs*. 42, no.9 (23 August 2023). <https://www.healthaffairs.org/doi/10.1377/hlthaff.2023.00134>.

<sup>10</sup> Jack M. Chapel, Bryan Tysinger, Dana P. Goldman, John W. Rowe, and The Research Network on an Aging Society. "The Forgotten Middle: Worsening Health And Economic Trends Extend To Americans With Modest Resources Nearing Retirement."

<sup>11</sup> Scott Fulford, Samyak Jain, Greta Li, Elizabeth Saunders, and Eric Wilson. "Making Ends Meet in 2022 Insights from the CFPB Making Ends Meet Survey." CFPB. December 2022. 14 December 2023. [https://files.consumerfinance.gov/f/documents/cfpb\\_making-ends-meet-in-2022\\_report\\_2022-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2022_report_2022-12.pdf). Page 13.

<sup>12</sup> Page 75901.

<sup>13</sup> Page 75902.

<sup>14</sup> Page 75902.

in ways that ensure that both parties have a mutual understanding of the relationship and available investment options.

We feel such proposed standards should apply just as much to digital as to print formats. Lower, older adult digital literacy levels necessitate that advisors apply the same standards to both formats. We also feel that communications materials (including disclaimers) – print or oral – should be in a font size or spoken pace that could be reasonably read or heard by an older adult. We encourage the agency to consider ways of ensuring that materials are provided to consumers in formats that they can either read or hear.

## Disclaimers

**EBSA proposes** that an advisor’s claim to not be an investment advice fiduciary can be rendered null if the advisor’s marketing materials, actions, oral communications, or other state or local laws provide evidence that they meet the proposed rule’s definition of an investment advice fiduciary.<sup>15</sup> In making the proposal, the agency nevertheless indicates it intends to allow parties to define themselves and their relationships as they see fit.<sup>16</sup>

**NCOA supports** the proposal to apply the investment advice standards based on how an advisor interacts with an advisee regardless of the title the advisor has or how the advisor markets themselves. This proposal would close any loopholes that advisors may find by, for instance, using titles such as “wealth manager” or “financial planner.”

## 4. Recommendations Regarding Securities Transactions or Other Investment Transactions or Investment Strategies

### Recommendations as to How Securities or Other Investment Property Should Be Invested After Rollover, Transfer, or Distribution

**EBSA proposes** having the rule also apply to the “acquiring, holding, disposing of, or exchange[ing], securities or other investment property.”<sup>17</sup> Furthermore, the regulation would also apply to strategy discussions and the transfer or rolling over of funds.<sup>18</sup>

**NCOA supports** the proposal to use the rule’s investment standards apply to rollovers and transfers of funds. The widespread use of fund rollovers and transfers necessitates that the scope of the rule also include this proposal. In 2020, over 5.6 million people rolled a combined \$618 billion into IRA accounts.<sup>19</sup> These totals increased in 2022 when individuals rolled over around \$780 billion from 401(k) plans into IRAs.<sup>20</sup> Many individuals rollover their funds into a single account in order to better manage their resources as opposed to managing, for instance, multiple accounts across multiple employers, so we appreciate that EBSA’s proposal would ensure that the rollover is done with the best interest of the investor in mind.<sup>21</sup>

---

<sup>15</sup> Page 75903.

<sup>16</sup> Page 75903.

<sup>17</sup> Page 75904.

<sup>18</sup> Page 75904.

<sup>19</sup> Greg Iacurci. “A 401(k) rollover is ‘the single largest transaction’ many investors make, expert says. What to know before doing it.” CNBC. 05 December 2023. 10 December 2023. <https://www.cnbc.com/2023/12/05/what-to-know-before-rolling-money-from-a-401k-to-ira.html>. IRS. “SOI Tax Stats - Accumulation and Distribution of Individual Retirement Arrangements (IRA).” 27 April 2023. 10 December 2023. <https://www.irs.gov/statistics/soi-tax-stats-accumulation-and-distribution-of-individual-retirement-arrangements>.

<sup>20</sup> Andy Markowitz. “New Federal Rule Cracks Down on Bad Retirement Savings Advice.” AARP. 31 October 2023. 10 December 2023. <https://www.aarp.org/retirement/planning-for-retirement/info-2023/retirement-security-rule.html>.

<sup>21</sup> Greg Iacurci. “A 401(k) rollover is ‘the single largest transaction’ many investors make, expert says. What to know before doing it.”

## Recommendations on Strategies, Management of Securities or Other Investment Property, and Account Types

In this section, **EBSA proposes** applying the investment advice fiduciary standards of this proposed rule to discussions around investment arrangements.<sup>22</sup>

**NCOA supports** the proposal to strengthen advice standards in this manner since, for instance, the advisor’s presentation of an investment portfolio provides opportunities for bad actors to present options that are not in the best interest of the consumer. The proposal would create an incentive for advisors to take care to ensure that they are not cherry-picking portfolio options that are not advantageous to the investee. Furthermore, the proposal would provide needed incentives for investment managers to ensure that controls are in place to prevent such issues.

### 6. For a Fee or Other Compensation, Direct or Indirect

**EBSA proposes** that fees associated with the provision of financial investment advice would need to be beneficial to the investor.<sup>23</sup> Under the proposal, the investment advice fiduciary would need to make its fees known to the investor in a transparent way.<sup>24</sup> Compensation that does not meet these criteria would be an impermissible “junk fee.”<sup>25</sup>

**NCOA supports** the proposal to allow individuals – many of which are sensitive to fees for services – to save as much as possible for their retirement. We also appreciate that the proposal would encourage upfront pricing and allow advisors to compete fairly based on price and quality of service and not on how well they can get away with passing a hidden service fee under the radar of the consumer.

---

<sup>22</sup> Page 75905.

<sup>23</sup> Page 75909.

<sup>24</sup> Page 75909.

<sup>25</sup> The White House. “FACT SHEET: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice.” 31 October 2023. 10 December 2023.

<https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>.